R118 RACE, P. B. The common law doctrine of aboriginal title in the New Zealand and Canadian courts.

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# The Common Law Doctrine Of Aboriginal Title in the New Zealand and Canadian Courts.

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INTRODUCTION

Common Law, from the earliest settlements in America, has recognised a historic proprietary right of indigenous populations to land prior to British sovereignty. As noted in Johnson and Graham's Lessee V. M'Intosh[1] the rights of the Indians predate and survived claims to sovereignty. The doctrine of aboriginal title appears to reconcile discovery of a 'new' land with the fact of prior occupation by an indigenous people.

The Crown in establishing sovereignty, has the ultimate title in all lands, but it is subject to the aboriginal title which survives sovereignty. Upon gaining sovereignty the rights relate to the relationship between the Crown and the original occupants of the territory. The relationship created is one where the Crown "recognises, accomodates and protects customary rights and practices of aboriginal people,"[2] in return the aboriginal people recognise the Crown's territorial sovereignty over their lands. The Crown's dominium is burdened with the aboriginal title which must be extinguished or surrendered before the Crown has full ownership (plenum dominium).

The actual legal nature of the relationship created has caused debate, most notably in the Canadian courts. Recently in Guerin V. The Queen,[3] Dickson J. described it as a fiduciary obligation upon the Crown, where the Crown is liable for any breach of its obligations. He felt there was "no real conflict between cases which characterize Indian title as a beneficial interest of some sort and those which characterize it as a personal, usufructary right."[4] Other judges in the case tried to fit the relationship into strict conventional areas of law such as agency (Estey J. ) and ideas of trust law.

However Dickson's J. view, which three other judges concurred with, provides the majority opinion and will most likely be supported in later cases as it involves a flexible view and coincides with early colonial ideas of protectionism towards the indigenous population. It may be an unique relationship as the doctrine developed from colonial law specifically dealing with the Crown's role in its overseas possessions.

This paper is an attempt to review the status of the doctrine given by the Canadian and New Zealand courts and the Privy Council opinions. The doctrine will be seen to have a steady progress through the Canadian courts, being upheld and consistently applied. But in New Zealand such a consistent line has not been taken. The doctrine's recent resurrection in New Zealand courts will be noted and some ideas given for its future recognition and application.

As the doctrine of aboriginal title relates to rights of the indigenous population prior to British sovereignty, little discussion is given to the Treaty of Waitangi. This is in no way intended to question its status, but simply to examine a source of Maori customary rights not entirely dependent upon the guarantees in the Treaty.

## THE DOCTRINE OF ABORIGINAL TITLE IN CANADIAN COURTS.

The Canadian courts, from County to the Supreme, have all affirmed the customary right of the Indians to "continue to live on their lands as their forefathers have lived".[5] In R. V. Calder[6] Dickson J noted that the court "recognises an aboriginal title as a legal right derived from the Indians historic occupation and possession of their tribal land".[7] This legal right is not exactly the same as that prior to sover-

eignty as the ultimate title is in the Crown and there are restrictions on alienation but nonetheless the Common Law doctrine allows continued use and occupation of ungranted Crown land.

In the 1932 case of R.V.Wesley[8] McGillivray J.A. stated that the Indians, by a proviso of section twelve of the National Resources Agreement[9] were "reassured of the continued enjoyment of a right which he has held since time immemorial."[10] The aboriginal title is not dependent upon statutory recognition, but is strengthened by legislative acts. In the case of R.V.Koonungok[11] it was held that the hunting rights were not dependent on Indian treaties or the Royal Proclamation. This is important as it gives all Indians similar protection whether covered by treaties or not.

R.V.White and Bob[12] dealt with a number of Indians who were found hunting on unoccupied Crown land without a permit during a closed season on hunting. The Crown claimed that the Treaty between the ancestors of the accuseds and Governor Douglas in 1854, did not confer hunting rights and even if it did these rights had been extinquished by the Indian Act 1952,[13] whichit was claimed extended general provisions of the Game Act 1960[14] to Indians. The court held that the aboriginal rights claimed by the accused had not been extinguished and that the Treaty confirmed the Indians in their aboriginal right to hunt and fish. Norris J.A. felt that the original explorers and their governments were bound to give recognition to the rights of the native inhabitants, as they were in a vulnerable position when dealing with the Indians who then outnumbered them and had a good knowledge of the country much of which was a wilderness. He stated that aboriginal rights

were very real rights essential to the survival of the Indians.

An action by a number of Inuits sought a declaration that a particular area was subject to aboriginal title and thus Inuit residing in or near that area could hunt and fish on it. The action resulted in the case of Hamlet of Baker Lake et al V. Minister of Indian Affairs and Northern Development et al.[15] Justice Mahoney relied on the Calder[16] case and granted the declaration, as the native title could not be found to have been surrendered or lawfully extinguished. He proposed that the basic presumption of the aboriginal title was "the right freely to move about and to hunt and fish over it".[17] To prove aboriginal title the plaintiff must establish four elements to satisfy the Common Law doctrine, according to Justice Mahoney. These are:-

"1) that they and their ancestors were members of an organised society

2) that organised society occupied specific territory over which they assert the aboriginal title

3) that the occupation was to the exclusion of other organised societies

4) that occupation was an established fact at the time sovereignty was asserted by Britain."[18]

These prior rights will continue until they are extinguished explicitly by treaties or implicitly through legislation. If legislation is the mode of extinguishment it must show its intention to do so clearly and plainly. As put by Mahoney J. it is 'intenable' since the Calder case to argue "that there is no aboriginal title unless it has been recognised by state or prerogative act of the Crown or by treaty having

statutory effect."[19]

Therefore from the cases it can be concluded that the doctrine is an independent legal right and renders a burden upon the Crown's title until extinguished by treaties or legislation or some other proper method. The courts have shown that unless extinguishment is clearly shown the doctrine remains. The title gives the indigenous people the right to lands reserved to them by the Crown and hunting, trapping and fishing rights over unoccupied and ungranted Crown land.

Guerin V. The Queen[20]

This case is worthy of separate discussion as it shows recent Canadian judicial opinion of the doctrine of aboriginal title. It is important as it opens a new possibility for defining the relationship between the Crown and indigenous people in Canada. It involved 'reserve'[21] land being land where the legal title is vested in the Crown but has been set aside for the use and benefit of a certain Indian band. The Musqueam band of Indians in 1957 surrendered a part of their reserve land to the Crown "in trust to lease the same to such person or persons and upon such terms as the government of Canada may deem most conducive to our welfare and that of our people."[22] Section 18(1) of the Indian Act 1952 regulates the disposition of such Indian land and places upon the Crown an equitable obligation.

The terms of the lease were originally negotiated between the band, its advisors, the Crown and the golf club interested in leasing the land. However the final terms agreed to were far less advantageous for the band, who were either "not consulted or informed that they had no choice in the matter."[23] A copy of the lease was not forwarded to the band until 1970 despite repeated

requests. The band claimed that the Crown, as a trustee, had failed to exercise a sufficient degree of care and management in the negotiation of the final terms in the lease. The Crown claimed that the trust expressed was a 'political' trust not a true trust and as such could only be enforced in parliament.

All judges in the case held that aboriginal title was an interest recognised by the courts, but their analysis of the legal nature of the title differed. Dickson J. stated that the nature of the aboriginal title and the statutory requirements placed upon the Crown "an equitable obligation, enforceable by the court to deal with land for the benefit of Indians."[24] The roots of the fiduciary relationship he considered, were in the aboriginal title but was dependent upon the legislation requiring Indians to surrender their lands to the Crown before they were capable of being alienated. When the land is surrendered the Crown must deal with it in the best way it can for the benefit of the surrendering Indians. The purpose of the surrendering to the Crown was to ensure that the Indians were not exploited by prospective purchasors or leasees. The Crown's discretion in regard to dealings with the surrendered land is thus controlled by its fiduciary relationship with the Indians.

Dickson J. felt that there was not a trust in any private law sense, but a fiduciary obligation which if breached by the Crown resulted in liability to the same extent as if a trust had been created. This analysis is flexible in that the trust need not be construed in a strict legal sense, but the responsiblity of the Crown to adhere to its obligations remains.

Thus the fiduciary obligation can be said to exist because of the recognition of an unextinguished aboriginal title to land and the responsiblity of the Crown to act in the best interests of the Indians upon surrendering of reserve land. The discretion

vested in the Crown is subject to a "fiduciary obligation to protect and preserve the band's interests from invasion or destruction."[25] The court held in the case that the Crown had breached it's fiduciary obligation and thus had to make good the loss suffered.

The Effect Of The Royal Proclamation 1763[26] On Indian Rights

The Proclamation established British sovereignty over the lands of North America in a response to competition from other countries colonizing the same areas. By the Treaty of Paris in the same year the French ceded their territories in the area to the English, although French laws were retained in some areas.

In its Indian provision the Proclamation stated "that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds."[27] It further provided "... We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within thoes parts of our Colonies where, We thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name,..."[28]

Two forms of consent were needed before British subjects could settle on unceded Indian lands. Consent had to be gained from the Indians themselves and the Crown. In accordance with these requirements of consent various treaties were from time to time made with the Indians. The standard terminology

of the treaties was the tribe of Indians would "hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the limits..."[29] In return for this surrendering of land the Crown undertook to set aside reserves and provide other benefits and considerations. By the formation of the treaties the Crown obtained from the Indians all proprietary rights they had over their lands. This enabled the Crown to open up new areas of the country for settlement. Thus the Indians had a recognised prior claim to the lands being ceded or surrendered.

The corollary of the executive act of concluding treaties is that land not extinguished by voluntary cessation to the Crown may remain in the hands of the aboriginal people of Canada, and be subject to their continuing rights. This involves large areas of Canada, especially in the north-west which is very much a wilderness.

There are approximately eleven formal treaties involving an estimate of half the Indian population in Canada and about 2,200 have resulted from negotiations with the Crown.[30] The policy of creating reserves has been questioned, but it is suggested that "at the very least they provide the aboriginal people with some amount of security from which they can gradually adapt to the larger community around them."[31]

The Royal Proclamation is still significant today and has been given statutory force. It has been noted in a number of cases that it was "declaratory and confirmatory"[32] of the aboriginal rights of the Indians. Lord Watson of the Privy Council in an early case St. Catherine's Milling[33] stated that the Proclamation of 1763 was the origin of Indian title in regard to "all Indian tribes then living under the sovereignty

and protection of the British Crown."[34] This Indian title has not been extinguished except by the creation and signing of the treaties and legislative action.

Later cases have gone further, in suggesting that while the Proclamation pertains to aboriginal rights it is not the sole source of these rights. In R.V.Koonungok[35] the 1763 Proclamation was seen as confirming pre-existing rights i.e. aboriginal rights of Indians and Eskimos and not creating anything new. This position was reiterated in R.V.White and Bob[36] where Norris J.A. stated "that the aboriginal right as to hunting and fishing were affirmed by the Proclamation and recognised by the treaties."[37]

All six judges in R.V.Calder[38] were decisive on this point showing clear authority for the proposition that the Proclamation is not the exclusive source of Indian title and rights which actually pre-date 1763. The rights have been vested in the Indian since "time immemorial." Thus although the Royal Proclamation is not the sole evidence it is necessarily important in affirming and recognising rights which remain as a burden upon the Crown until Indian title to land is ceded or surrendered to the Crown.

## Legislative Recognition Of Aboriginal Title

Apart from Common Law and ultimately the courts recognising aboriginal rights, Canadian legislation in a variety of ways has also recognised the doctrine. The Indian Act 1952 provides a framework by which the government administers affairs of the Indians. It does not contain all legislation affecting Indians as generally they are subject to the same

laws as non-Indians. But it is "special legislation which the government considers is essential to the needs of Indian people, not only as a safe-guard to protect their treaty and property rights but as a means of promoting their advancement."[39] Section 88 makes provicial law of general application subject to the terms of any treaty. But the position as to whether federal legislation is also subject to the treaties is unclear

National Resources Agreements of 1930 which relate to the Prairie Provinces contain a clause (section 12) which protects Indian rights "of hunting, fishing and trapping of game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."[40] Inconsistent provincial law is disregarded but where federal legislation is inconsistent with Indian rights the position is uncertain.

The Constitution Act 1982,[41] which is the Canadian Charter of Rights and Freedoms, provides in section 35(1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada as being recognised and affirmed. This constitutional protection confirms aboriginal rights as legal and enforceable against the Crown and private individuals in court actions. This then has the effect of making federal legislation accountable to the doctrine of aboriginal title solving the problem raised earlier in respect of federal legislation. Section 35(2) includes Indian, Inuit and Metis as aboriginal peoples in relation to the Act.

The Effect Of The Treaties.

It is estimated that approximately half of the Indian population of Canada are under formal treaties. Although aboriginal rights are not dependent on treaties for recognition it is appropriate to see how the courts have dealt with the treaties. The formal treaties in Canada were negotiated

after the Royal Proclamation and are thus agreements between the Crown and native subjects. The rights were originally part of a full territorial claim to lands but by the treaties they became non-territorial rights existing over ungranted and unoccupied Crown Lands. As described by Johnston J. in the case Sikyea V.R.[42] "the rights of Indians to hunt and fish for food on unoccupied Crown land has always been recognised in Canada- in early days as an incident of their ownership of the land, later by the treaties by which the Indians gave up their ownership rights in these lands."[43]

While most courts recognise the Common Law doctrine of aboriginal title as the source of hunting and fishing rights some judges have regarded the rights as emanating or being strengthened by terms of specific treaties. In an early case Attorney-General(Canada) V. Attorney-General(Ontario)[44] the Privy Council described the treaties as a 'personal obligation' no more than a promise and an agreement by the governor. From this is the suggestion that the Crown can be bound by its obligations to the Treaty Indians. This was supported in R.V.Wesley[45] where the Crown was held to have an 'executive obligation' to comply with the treaties to which it was a party. This has been called[46] the 'contractual obligation' approach, which relies on the existence of pre-existing proprietary rights of the indigenous population to provide consideration for the Crown's promises. The Crown's consideration in return is to respect aboriginal rights to hunt and fish. However a number of problems arise if strict contract rules are applied. For example it must be established that the parties had equal bargaining power, with full knowledge and disclosure of the terms. Also the aspect of consideration may be questioned- can the giving up of full proprietary rights by

the Indians be said to equate with the promise by the Crown to recognise non-territorial aboriginal rights?

Conclusions On The Canadian Approach.

The Common Law doctrine of aboriginal title can be seen to be firmly established and consistently applied in the Canadian courts. It is a title applying to rights held from "time immemorial" by the indigenous people of Canada. It consists of rights to possess and occupy traditional land and to hunt, fish and trap over unoccupied Crown lands independent from a territorial claim. The gaining of sovereignty vested the ultimate title to all lands in the Crown but it is a title subject to the aboriginal rights. Once native lands are surrendered or released to the Crown the native title is extinguished. The Constitution Act 1982 provides recognition and affirmation of existing aboriginal title making it a legal right enforceable in the courts.

The Canadian courts have also stated that the title is not dependent upon legislation, the Royal Proclamation or any subsequent treaties. These merely confirm the aboriginal title. However the actual relationship between the Crown and the indigenous people, created by the treaties is subject to differing opinion.

It appears in Canada a clear commitment has been made by both the courts and legislature to recognise and enforce the doctrine. The courts are not ready to dismiss the obligation upon the Crown despite the fact that it can not or has not been catagorised into a specific legal concept. It may emerge that the relationship as suggested by Dickson J. in Guerin V. The Queen[47] will prevail because of its innate flexibility, rather than the relationship being pigeon-holed into already existing rules.

## THE HISTORY OF THE DOCTRINE OF ABORIGINAL TITLE IN NEW ZEALAND.

The doctrine was first espoused in New Zealand in R.V. Symonds[48] which has been described as a "classic expression of native property rights subsequent to British acquistion."[49] It involved a dispute as to whether purchase of land from the Maoris under, and conforming with a certificate issued by Governor FitzRoy was valid. It was held that the certificate could not convey a legal right, the purchasor simply purchased from the natives without authority from the Crown.

Chapman J. stated that the Crown "enjoys the exclusive right of acquiring newly found or conquered territory and of extinguishing the title of any aboriginal inhabitants."[50] The Crown by a fundamental maxim of Common Law is the sole source of title to land but it must respect the native title. It may only extinguish the native title by free consent of the natives. The Treaty of Waitangi was seen as guaranteeing the native title but was not the source. The exclusive right of the Crown to extinguish the native title was seen as protection for the Maoris "from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them."[51]

The Native Land Court in the Kauwaeranga[52] judgment of 1870 heard a claim for a certificate of title to be granted over an extensive mudflat thereby giving local Maoris ownership. Fenton C.J. thoroughly discussed the history of New Zealand leading up to the Treaty of Waitangi and stated that the soil did not absolutely vest in the Maoris, they did not have "absolute propriety of the soil."[53] There was clear recognition of native title to land guaranteed by the Treaty, with the

ultimate title to land being vested in the Crown.

However following these cases no consistent line has been taken by the New Zealand courts in relation to the doctrine. It is suggested that the Maori Land Wars in the 1860's and susequent legislation influenced the courts in reviewing the protective role that had earlier been taken.

Wi Parata V.Bishop of Wellington and the Attorney-General[54] has been suggested as of the first cases to take a contradictory line to Symonds[55].The case involved a Crown grant being issued to the Bishop in respect of native land without the knowledge or consent of the tribe who occupied the land. Prendergast C.J. in delivering the judgment stated that the Supreme court had no jurisdiction to inquire into or avoid a Crown grant. It "must be assumed, that the sovereign power has properly discharged its oblications to respect....all native proprietary rights."[56] A Crown grant he added, implies that the native title over the land has been extinguished. This statement is consistent with Symonds[57] in which it was also held that the Crown had the sole right to extinguish the native title.

The inconsistencies between the cases appears to arise from statements by Prendergast C.J. which inferred that the Maoris were "barbarians without any form of law or civil government."[58] He goes on to say that the words in the Native Rights Act 1865 referring to the "ancient custom and usage of the Maori people"[59] could not refer to customary law of Maoris as none existed which the courts of law could recognise

The Privy Council discussed the issue of native title when Nireaha Tamaki V.Baker[60] was brought before them after a Court of Appeal decision in 1894. The appellant claimed that

the native title to certain land had not been extinguished and thus it could not be said to be Crown rural land and open for sale.

Lord Davey delivering the judgment strongly rejected the argument in Wi Parata[61] that the Maoris had no customary law which could be enforced by the courts. The Lordships felt that legislation expressly assumes existence of land held under custom and usage. The native title must be recognised, if it could be proved by evidence of possession and occupation, or it may be said to be extinguished in accordance with the law but it could not be ignored. Symonds[62] was cited as supporting the idea that native title was to be recognised and could only be extinguished by the Crown in strict compliance with the law.

The case shows important confirmation by the Privy Council that native title to land is a right enforceable in courts.The title remains until properly extinguished.

The Court of Appeal in Hohepa Wi Neera V.Bishop of Wellington[63] dealt with the same facts as in Wi Parata[64] and consequently the court had difficulty in distinguishing it.

Williams J. held by using Wi Parata[65] as authority, the issue of a Crown grant must be "conclusive evidence that any native right then existing in the land had been cede to the Crown."[66] Stout C.J. in his judgment scathingly slated the Privy Council dicta in Nireaha Tamaki[67] by showing that legislation relied on i.e. Native Rights Act, 1865 to illustrate recognition of native title, did not by virtue of the Interpretation Act 1888 bind the Crown.

Stout C.J. relied on an Act in 1862 which stated that no native right in respect of land could be recognised in court until it had been defined and a certificate of title issued.

The Act was repealed by the Native Lands Act 1865 which established Native Land Courts to investigate native title to land. Hohepa Wi Neera[68] shows the beginnings of an approach taken by later cases that native title to land is not enforceable in a court of law until the Native Land Court has investigated and affirmed the claim with the issue of a certificate of title.

This approach was expressed in Tamihana Korokai V. Solicitor-General[69] where Stout C.J. reiterated that land is vested in the Crown and that a customary title could not be recognised until a freehold title had been issued. Crown land is freed from native customary title when the land is ceded by Maoris. The Native Land Act 1909 by section 90 gave the Native Land Court exclusive jurisdiction to investigate customary title and to determine interests in the land.

The question of fishing rights was dealt with in Waipapakura V.Hempton.[70] The appeallant claimed that Maori fishing rights were exempt from the operation of the Fisheries Act 1908 by section 77(2) which stated "nothing inthis Act shall affect any existing Maori fishing right." Stout C.J. held that the clause did not confer any rights but was a saving clause. He stated that the law in relation to fisheries was the same in New Zealand as in England, except where it had been altered by statute. But he did not feel that section77(2) conferred any individual rights to fish in tidal-waters, this could only be done by a special Crown grant or legislation which had not been done here. The Maoris did have land adjoining the tidal-waters, but ownership could only extend to the high water mark and not to land under the tidal waters. Wi Parata[71] and Nireaha Tamaki[72] were both used as authority to say that "until given by statute no such right could be enforced."[73]

Much later in Inspector of Fisheries V.Weepu[74] the question arose again as to the meaning of "existing Maori fishing rights" in section 77(2) of the Fisheries Act 1908. The section was relied upon as a defence to charges in relation to whitebaiting. Adams J. of the Supreme Court was of the opinion that fisheries guaranteed by the Treaty of Waitangi and still unextinguished were within the words of the section.

However a certificate of title had been granted and the bed of the river where the fishing took place was included within the grant. It was held that the certificate meant that any Maori native title had been extinguished and from then on fishing rights were to be considered to be the same as any fishing rights over freehold land. The defendants had to show a licence or right from the feesimple owner allowing them to fish but could not rely on the Treaty. Although Adams J. does state that a fishing right can be dissevered from ownership of the soil he added that "all rights of fishing must in my opinion be regarded as included in the title to lands conferred by the certificate."[75] This appears to suggest that any fishing right severed from ownership depends upon a special grant because pre-existing fishing rights are extinguished with a feesimple grant.

In Re:An Application For Investigation of Title to The Ninety Mile Beach[76] Turner J. had to deal with the question of whether land lying between high and low water mark of the foreshore could be subject to a title to customary land being issued. He held that because in the past the Maori Land Court had investigated titles down to the low water mark and no legislation had fettered these investigation it must be accept ed that a freehold title could be granted. He stated that once

a freehold order had been made fixing the boundary at the high water mark (as done in the case) the Crown retained ownership of the land between high and low water mark. It was held that by granting customary title to land above high water mark, any Maori rights over land adjoining but below this mark had been extinguished. This suggested that customary title to an area of land can be extinguished because of a freehold title given to an adjoining piece of land. By granting a freehold title to customary land bordering the sea "the Crown was freed from any obligations it had undertaken in the Treaty Of Waitangi."[77]

At this stage it was still considered that Maori fishing rights were dependent upon a freehold order for the land over which the right was to be exercised.

This notion was highlighted in Keepa V.Inspector Of Fisheries[78] where Hardie Boys J. stated that customary fishing rights on the foreshore extinguished when a freehold title was given fixing the boundary at the high water mark. To be able to claim protection from section77(2) the appellants had to show that they had a title covering the foreshore, otherwise they were subject to the same laws as the rest of the public.

The recent case of Te Weehi V. Regional Fisheries Officer[79] dealt with the words of the Fisheries Act 1983 in section 88(2) "nothing in this Act shall affect any Maori fishing rights." In quashing the convictions Williamson J. held that the appellants were taking paua in accordance with a customary fishing right within the meaning of the words in the section, and thus other provisions within the Act did not apply. The case is significant because the claim to the fishing right was not brought on the basis of ownership of the foreshore so could be distinguished from earlier cases.

Williamson J. stated that"a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore"[80] and could arise over Crown owned land below tidal and navigable river waters. This gives effect to general principles of Common Law where it is stated that a fishery may be severed from the soil. Because Williamson J. was able to distinguish this case from Weepu[81] and Keepa[82] he went on to discuss Canadian cases where the approach has been to acknowledge customary rights of native people unless specific legislation has clearly taken away the rights. The Fisheries Act 1983 in section 88(2) differs slightly from the wording in its predecessor section 77(2) of the Fisheries Act 1908. Williamson J. felt that the exclusion of the word "existing" in the later Act did not significantly alter anything. However, he felt the word "any" in the phrase "any Maori fishing rights" showed a legislative attempt to include all Maori fishing rights, not just some specific ones. This is in keeping with growing public and now legislative policy to acknowledge rights "which may or may not be protected by statute."[83] He shows a clear move away from the 'statutory approach' which existed in the earlier cases. In the absence of clear legislation extinguishing Maori customary rights they must be recognised to be continuing.

The Treaty Of Waitangi

A brief discussion of the effect of the Treaty is necessary in relation to the doctrine of aboriginal title as it shows the relationship between the Maoris and Crown. The Treaty is important in that it expresses the aboriginal rights the Crown agreed to respect.

There is much debate as to whether British sovereignty over New Zealand originated from the signing of the Treaty in 1840 or whether it pre-dated the Treaty. There is evidence to support both arguments but it is not proposed to analyse these arguments. The date of sovereignty does not determine whether or not the aboriginal rights under the doctrine are recognised, as they are not dependent upon the Treaty.

The starting point again is R.V.Symonds[84] where Chapman J. stated that "the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or practice anything new or unsettled."[85] The Treaty was not the source of native rights but confirmed something which was already in existence by virtue of Common Law.

A different approach was taken in Wi Parata[86] where Prendergast C.J. held that in so far as the Treaty was supposed to cede sovereignty "it must be regarded as a simple nullity" because "no body politic existed capable of making cession to sovereignty."[87] The Treaty could not give Maoris any legal rights over their land because it did not cede sovereignty.

The Privy Council in Hoani Te Heuheu Tukino V. Aotea District Maori Land Board[88] felt that rights guaranteed in the Treaty could not be enforced in the courts until there had been clear legislative recognition.

In Weepu[89] Adams J. felt that the rights to fisheries preserved by the Treaty remained unextinguished and fell within the words of the Fisheries Act 1908. But the rights could be extinguished by legislation or by a certificate of title being issued for the land over which the fishing rights were to be exercised. Williamson J. in Te Weehi[90] emphasised that the fishing rights being claimed were rights enjoyed prior to the Treaty which just protected those rights. Finally in the New Zealand Maori Council V. Attorney-General[91] Cooke J. viewed

the Ireaty as a "partnership between races"[92] where the partners must act with utmost good faith towards each other.

But in terms of its legal status?

Conclusions on the New Zealand Approach.

Initially, the doctrine of aboriginal title was favourably asserted by the early colonial courts in New Zealand. R.V.Symonds[93] clearly acknowledged the doctrine, and it was supported by the Kauwaeranga[94] judgment of the Native Land Court and also by the Court of Appeal in R.V. Lundon and Whittaker Claims Act 1871.[95]

However following these cases there was a change in judicial opinion of the doctrine. Although some recognition was given the doctrine could not be used to question executive Government decisions. This was shown in Wi Parata[96] where the issuing of a Crown grant must be assumed to have been properly conducted so the Crown's acts could not be questioned. Stout C.J. developed a "statutory approach" to customary land rights, no customary title to land could be upheld in court without a Crown grant or statutory recognition. Legislation was passed which tended to support the notion. The Native Land Act 1909 in section 84 provided that customary title to land could not be enforced against the Crown in any court. The Native Land Court was given exclusive jurisdiction to inquire into customary claims and certificates of title could be issued.

In relation to fishing rights, early legislation appeared to protect customary fishing rights. Section 77(2) of the Fisheries Act 1908 stated that "Nothing in this Act shall affect any existing Maori fishing rights." But Stout C.J. in Waipapakura[97] interpreted the words as not conferring any rights upon the Maoris. He felt any fishing right must relate

to ownership of land over which the right is to be exercised. In the Weepu[98] case Adams J. acknowledged that fishing rights could be severed from ownership of the soil, but a special grant or licence from the proprietor of the soil was still required. Adams J. also significantly stated that fisheries guaranteed in the Treaty of Waitangi were within the words of the Fisheries Act 1908 as they had not been extinguished.

Finally in Ie Weehi[99] Williamson J. reconciled both judicial and legislative opinion in deciding that the Fisheries Act 1983 protected customary fishing rights. He used Weepu[100] to support his decision that customary fishing rights continued until extinguished. The Fisheries Act 1983 was interpreted to confirm his view.

COMPARISON BETWEEN THE NEW ZEALAND AND CANADIAN APPROACHES.

By virtue of British Sovereignty being established in both countries the Common Law of England was adopted. Colonial law developed as a branch of Common Law with the colonial courts, described by Chapman J. applying some of the earliest settled principles of the law. The doctrine of aboriginal title was part of this branch of Common Law which governed the relationship between Great Britain and its overseas possessions.

Johnson V.M'Intosh[101] and R.V.Symonds[102] are considered to be two classic cases showing the fundamental principle of aboriginal title. The essential starting point of the doctrine is the Crown being the exclusive source of private title to land. "To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any

aboriginal inhabitants to be found thereon.[103] In Johnson it was shown that colonial law placed two limitations on the rights of the indigenous population. The first being that only by sale or cession by aboriginal owners could aboriginal title be extinguished. The second restricted alienation by sale or cession to the Crown. This ensured that the Crown retained ultimate control over the expansion of the settlements. Protection, and a guardianship role over the aboriginal people underlay much of these principles. R.V.Symonds[104] asserted that the native title must be respected and could only be extinguished ("at least in times of peace") by the free consent of the native occupiers. The case added that the title could be subject to legislative extinguishment. The line from Symonds[105] was followed in New Zealand in two following judgments, but following the Maori Land Wars and during a period when Prendergast and Stout were Chief Justices a divergence occurred. This later approach will be shown to be inconsistent with the Common Law doctrine, the Canadian decisions and advice from the Privy Council.

The Canadian approach is clearly shown in R.V.Calder[106] and affirmed in later cases. The doctrine was held to be a legal right allowing continued use and occupation over ungranted Crown lands until it was extinguished. This approach has been described as the "continuity" theory, where the proprietary rights of the indigenous population continue until extinguishment, regardless of whether the territory was acquired by conquest, cession or settlement. Extinguishment may be by explicit acts such as treaties between the Crown and aboriginals, or implicitly through legislation. If the latter course is taken legislation must be expressed in such a manner that "a clear and plain intention to extinguish that right"[107] is shown. The case of Hamlet of Baker Lake[108] defined

four elements required to be established to shown aboriginal title.

However, in New Zealand following the judgment of Wi Parata[109] the New Zealand courts moved away from recognising the Common Law doctrine. Prendergast C.J. rejected the notion that the Crown could be bound by Maori aboriginal rights, unless there was statutory recognition of such rights. The protective role of the Crown was discarded perhaps because of the reluctance by many Maoris to cede their lands, thus restricting growth of the early settlements. In Nireaha Tamaki[110] Prendergast C.J. again ignored the doctrine stating that there was no rule of law existing by which the dealings between the Crown and the 'native tribes', in relation to the extinction of their territorial rights, could be tested.

When the Privy Council heard the case on appeal, it stated the argument that Maoris had no customary law which the courts could recognise went too far, and "that it is rather late in the day for such an argument to be addressed to a New Zealand court".[111] The Lordships felt the Supreme Court was bound to recognise "the rightful possession and occupation of the Natives".[112] This showed a clear attempt by the Privy Council to make the New Zealand courts uphold the Common Law doctrine, in line with what was happening in other colonies, notably Canada.

The New Zealand judges led by Stout C.J. in Hohepa Wi Neera[113] rejected the Privy Council advice on the grounds that New Zealand local laws had been misinterpreted. The Native Land Act 1909 put paid to any further possibility that aboriginal title could be brought against the Crown in relation to customary land. Similar wording is now contained in Maori Affairs Act 1953 sections 155 and 157. The judges

clung to the principle that the Crown has paramount ownership of all lands and appeared to see aboriginal title as being inconsistent with this. However as earlier shown the title is dependent upon the Crown's ultimate dominium. The case of Tamihana Korokai V. Solicitor-General[114] shows the approach taken by the courts in response to the legislation and judicial feeling at the time. It showed that aboriginal title to land could not be recognised until a freehold order had been issued, producing the 'statutory approach! Therefore in New Zealand because of this approach, aboriginal title to land is not recognised until given a statutory cognizance. The Crown's title is not burdened with the doctrine until then.

In relation to hunting and fishing rights, the Canadian courts have allowed claims to exercise these rights over unoccupied Crown land. The first case to consider the question was R.V.Wesley[115] which did not include a territorial claim to land over which the accused was found hunting. The right to hunt was upheld as being a "right enjoyed from time immemorial". Similarly in the case of R.V.White and Bob[116] hunting rights claimed by a number of Indians were catagorised as being of aboriginal in nature and had not been extinguished by a concluded treaty. In Sikyea V.R.[117] the rights were said to be initially an incident of land ownership and later developed from treaties where the proprietary rights of Indians to land were ceded to the Crown. In Hamlet of Baker Lake[118] hunting and fishing rights were considered to be basic elements of aboriginal title.

Clearly then, the Canadian cases show that the right to hunt and fish over unoccupied Crown land exists as a constitutive component of the doctrine of aboriginal title.

The rights need not necessarily be attached to ownership of soil over which they are exercised, in essence making them non-territorial rights. This is because the treaties between the Indians and the Crown ceded the land but not the hunting and fishing rights, which are thus severed and remain over ungranted Crown land. Various statutory enactments confirm these rights most notably the Constitution Act 1982.

In New Zealand the early cases involving fishing rights regarded them as incidents of ownership of the soil. In Waipapakura V.Hempton[119] Stout C.J. again took a statutory-based approach, saying that legislative provisions were needed before a court could recognise Maori customary rights to fish in the sea or tidal waters. He held the words "Nothing in this Act shall affect any existing Maori fishing rights" did not confer any private right to Maoris, as the Common Law of England applicable in New Zealand states that no private rights can be given to individuals to fish in tidal waters to the exclusion of others unless a specifically defined right has been given by the Crown.

Adams J. in the much later case of Inspector of Fisheries V.Weepu[120] acknowledged that fishing rights may be severed from ownership of the soil, but once land over which the rights are being exercised has been granted fishing may only be permitted by licence, leave or some other right derived from the owner. In relation to the words "existing Maori fishing rights" Adams J. concluded that customary fishing rights were within protection of the Act but if the land is vested in the Crown, "the Crown permits the exercise of those rights, and the Maori title rests on sufferance of the Crown

as proprietor of the lands."[121] This shows a departure from the Waipapakura[122] as there it was held that customary fishing right were not preserved and needed statutory recognition before being upheld in court. Although recognising severance from ownership, Adams J. still felt it was up to the Crown, or other owners of the soil to give effect to the rights. The case of Keepa V. Inspector of Fisheries[123] again failed to acknowledge that customary fishing rights could exist as severed from an ownership claim based on the Common Law doctrine.

The case of Ie Weehi[124] provides a major turning point in relation to this question and puts New Zealand on a course similar to Canada. Williamson J. agreed with the decision in Weepu[125] that customary fishing rights remain unless extinguished, and found no legislation which had expressly done so. The omission in the Fisheries Act 1983 of the word "existing" contained in the earlier Act didnot he feel alter much, as the rights claimed existed prior to the passing of the Act. He found legislative support for customary fishing rights to be protected by the new Act. Williamson J. was able to distinguish the earlier cases as the present case was not based on the ownership of the foreshore, it was a "non-territorial" claim. He was able to uphold such a claim following comments in Weepu[126] and Common Law principles which allow fishing rights to exist independently of ownership of the soil. He also noted the claim did not involve an "exclusive right"[127] as there were no total restrictions on taking paua from the area. The regulations related to taking paua of a certain size, and the Maoris were taking paua of a reasonable length in exercising their customary right, rather than the specific measurement. This leaves open the question as to whether in later cases acustomary fishing right could be

exercised over areas where there were total restrictions on fishing. Thus it can be seen that this judgment goes some way in being consistent with the Canadian cases and the Common Law doctrine by upholding customary fishing rights severed from ownership of the soil, and acknowledging that the rights continue until extinguished.

Future Directions in New Zealand.

Whilst inroads can be seen into restoring the doctrine in New Zealand, there are still a number of important points which need clarification. These being whether customary fishing rights will prevail over total restrictions on fishing and gathering shellfish and whether section 155 and section 157 of the Maori Affairs Act 1953 will remain in the face of growing public and legislative change. Maoris will remain dissatisfied with the treatment handed to them in relation to their customary rights until proper acknowledgment is given to their prior occupation and use of the lands, as has been done in the Canadian courts.

Sections 155 and 157 of the Maori Affairs Act 1953 amounts to legislative extinguishment of aboriginal title to land, thus excluding any claim being brought before the courts. The only real avenue available is for a claim to be brought before the Waitangi Tribunal to investigate whether the sections are in breach of the principles of the Treaty of Waitangi. If found to be so a recommendation could then be made by the Tribunal to have the legislation amended or repealed. However public policy may be moving in this direction already. In the submissions to the Court of Appeal in the New Zealand Maori Council[128] case it was noted that in the Mininster's introduction to the Maori Affairs Bill introduced to Parliament on the twenty-ninth of April he stated

that "existing provisions will be dropped, which say that customary title should not avail against the Crown."[129] The Minister clearly acknowledged that section 155 was inconsistent with the principles of the Treaty and proposed that section 157 not be re-enacted. If these provisions are repealed the effects will be great. All ungranted Crown land may then be subject to aboriginal title and thus will remain unless shown to have been extinguished by sale or cession by the Maori customary owners.

In relation to the point raised in the Keepa[130] case and left open in Ie Weehi[131] the question needs to be answered in court. One of the grounds Hardie Boys J. rejected the claim of a customary fishing right in Keepa[132] was that if allowed for a few specific Maori tribes it would result in "excluding even the right of the Crown and the subjects of the Crown to enjoy the like right of fishing."[133] He felt both Maoris and Pakehas must observe the regulations relating to fishing as they were imposed for the benefit of both. In Ie Weehi[134] Williamson J. held that the case he was considering did not involve such an issue as all had a right to take paua over the foreshore concerned. So the purposes of the Fisheries Act 1983 were not significantly frustrated. So the question as to whether fishing rights are able to be exercised by certain Maori tribes to the exclusion of all others needs to be clarified in a later case. This exclusiveness is permitted in Canada, shown clearly in the case of R.V.White and Bob[135] where the Indians found hunting on unoccupied Crown land without a permit, during a closed season on hunting were held to be exercising a customary right.Instead of a customary claim being brought in New

Zealand courts, collaterally with a criminal conviction which has tended to be the case in the past, a claim could be brought by section 4 of the Judicature Act 1972 for a review to be made and a declaration be given. A customary right could be justified on grounds that the principle of international law "that loss by indigenous people of their interests in land should be compensated by the same or similar interest..."[136] Such discrimination may show "an overall justice rather than injustice."[137]

If this exclusivity is upheld and the two sections repealed the Common Law doctrine of aboriginal title will be fully restored in New Zealand consistent with its position in Canada.

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FOOTNOTES

1 Johnson V. M'Intosh (1823) 8 Wheaton 543

2 Aboriginal Rights and Sovereignty by P.G.McHugh 1986 N.Z.L.J. 57

3 Guerin V.The Queen (1985) 13D.L.R.(4th)321

4 Supra n:3 at 339

5 Attorney-General(B.C) V. Calder (1973)34D.L.R(3d)145

6 Supra n:5

7 Supra n:5

8 R.V.Wesley[1932] 4 D.L.R.774

9 National Resources Agreements 1930

10 Supra n:8 page 786

11 R.V.Koonungok(19630 45 W.W.R.282 (N.W.T.T.C.)

12 R.V.White and Bob (1964)50D.L.R. (2d)613

13 Indian Act 1953 R.S.c,149s.I.

14 Game Act R.S.B.C. 1960 C.160

15 Hamlet of Baker Lake V.Mininster OfInDian Affairs and Northern Development [1980] 107 D.L.R. (3d)513

16 Supra n:5

17 Supra N:15 page 547

18 Supra n: 15 page 542

19 Supra n:15 page 542

20 Supra n:3

21 Indian Act 1953 Section2 and Section18

22 Supra n:3 page 322

23 Supra n:3 page 344

24 Supra n:page 334

25 Supra n:3 page 343

26 Royal Proclamation 1763 R.S.C.1970 Appendices page 123

27 Supra n:26 page 127

28 ibid page 128

29 The Indian Title Question in Canada by K.LYSYK 1973 Canadian Bar Review 450 vol.51

30 Canadian Constitutional Law in a Modern Perspective Edited by J.N.Lyon and R.G.Atkey, University of Toronto Press, Toronto 1970 at page 125

31 ibid.

32 Norris J. supra n:12 page636

33 St. Catherine's Milling (1889) 14 A.C.46

34 ibid page 55

35 Supra n:11

36 Supra N:12

37 Supra n:12 page 625

38 Supra n:5

39 Supra n:30 page 126

40 Supra n:9

41 Constitution Act 1982 enacted by Canada Act 1982 (U.K.) c.11 Canadian Charter of Rights and Freedoms.

42 Sikyea V.R.(1964)43 D.L.R.(2d)150

43 ibid page 165

44 Attorney-General (Canada) V.Attorney-General (Ontario) (1897) App. Cases 199 (P.C)

45 Supra n:8

46 Maori Fishing Rights and the North American Indians P.G.McHugh 1985 O.L.R. vol.6 no.1 62

47 Supra n:3

48 The Queen V.Symonds (1847)[1840-1932]N.Z.P.C.C. 387

49 Aboriginal Title in the New Zealand Courts, P.G.McHugh 1984 Vol.2 C.L.R.235

50 Supra n:48 page 389

51 Supra n:48 page391

52 Kauwaeranga judgment reprinted 1984 14 V.U.W.L.R. 227

53 ibid page 245

54 Wi Parata V.The Bishop of Wellington [1877] N.Z. Jur. (N.S) S.C.72

55 Supra n:48

56 Supra n:54 page 79

57 Supra n:48

58Supra n:54 page 77

59 Supra n:54 page79

60 Nireaha Tamaki V.Baker(1901)[1840-1932]N.Z.P.C.C. 371

61 Supra n:54

62 Supra n:48

63 Hohepa Wi Neera V. The Bishop of Wellington [1902]21 N.Z.L.R. 655 (C.A.)

64 Supra n:54

65 ibid

66 Supra n:63 page 671

67 Supra n:60

68 Supra n:63

69 Tamihana Korokai V.Solicitor-General [1912]32 N.Z.L.R. 321 (C.A.)

70 Waipapakura V.Hempton [1914]33 N.Z.L.R. 1065

71 Supra n:54

72 Supra n:63

73 Supra n:70 page 1072

74 Inspector of Fisheries V.Weepu [1956] N.Z.L.R. 920

75 ibid page 926

76 In Re An Application For Investigation of Title To The Ninety Mile Beach[1960] N.Z.L.R. 973

77ibid page 976

78 Keepa V.Inspector of Fisheries[1965] N.Z.L.R. 322

79 Te Weehi V. Regional Fisheries Officer Unreported Christchurch Registry M662/85

80 ibid page 8

81 Supra n:74

82 Supra n:78

83 Supra n:79 page 2

84 Supra n:48

85 Supra n:48 page 390

86 Supra n:54

87 Supra n:54 page 78

88 Hoani Te Heuheu Tukino V.Aotea District Maori Land Board [1941] A.C. 308

89 Supra n:74

90 Supra N:79

91 New Zealand Maori Council V. Attorney-General Unreported Wellington Registry C.A. 54/87

92 ibid page 35

93 Supra n:48

94 Supra n:52

95 R.V.Lundon and Whittaker Claims Act 1871 (1872) 2 C.A. 41

96Supra n:54

97 Supra N:70

98 Supra n:74

99 Supra n:79

100 Supra n:74

101 Supra n:1

102 Supra n:48

103 Supra n:48 page 389

104 Supra n:48

105 Supra n:48

106 Supra n:5

107 Supra n:15 page 552

108 Supra n:15

109 Supra n:54

110 Supra n:60

111 Supra n:60 page 382

112 Supra n:60 page 383

113 Supra n:63

114 Supra n:69

115 Supra n:10

116 Supra n:12

117 Supra n:42

118 Supra n:15

119 Supra n:70

120 Supra n:74

121 Supra n:74 page 925

122 Supra n:70

123 Supra n:78

124 Supra n:7 9

125 Supra n:74

126 Supra n:74

127 Supra n:79 page 8

128 Supra 91

129 Supra n:91 Submissions by New Zealand Maori Council page 22 paragraph 4:10

130 Supra n:78

131 Supra n:79

132 Supra n:78

133 Supra n:78 page 328

134 Supra n:79

135 Supra n:12

136 Supra n:129 page 24 paragraph 4:12

137 Supra n:79 page 12

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